

Arsenoff



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Optic-Electronic Corp.

File: B-235885

Date: October 6, 1989

DIGEST

Sole-source award is proper where procurement involves a foreign military sale and foreign government on whose behalf procurement was conducted requested that award be made to a specific source.

DECISION

Optic-Electronic Corp. protests a proposed sole-source award to Kollsman, a division of Sequa Corporation, under request for proposal (RFP) No. DAAA09-89-R-0793, issued by the United States Army on behalf of the Egyptian Government for laser range finders and ballistic computer systems. The protester challenges the sole-source restriction.

We deny the protest.

The procurement involves a foreign military sale (FMS) conducted under the Arms Export Control Act, as amended, 22 U.S.C. § 2751 et seq. (Supp. IV 1986), which authorizes the Department of Defense to enter into contracts for purposes of resale to foreign countries. The Competition in Contracting Act of 1984 (CICA), which generally requires that agencies obtain full and open competition through the use of competitive procedures, exempts procurements in which the "written directions of a foreign government reimbursing the agency for the cost of the procurement of the property or services for such government, have the effect of requiring the use of procedures other than competitive procedures." 10 U.S.C. § 2304(c)(4) (1988).

The Federal Acquisition Regulation (FAR) reiterates this exemption, and provides for its use in circumstances such as "[w]hen a contemplated acquisition is to be reimbursed by a foreign country that requires the product be obtained from a

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particular firm as specified in official written direction such as a Letter of Offer and Acceptance." FAR § 6.302-4(b)(1). Department of Defense FAR Supplement (DFARS) § 225.7307(a) further provides that the contracting officer shall honor requests for sole-source prime and subcontracts from the FMS customer as specified by the Letter of Agreement or other written directive by the military sales organization.

Optic does not dispute that the Egyptian Government requested Kollsman equipment in writing on a sole-source basis as part of an FMS; rather, the protester contends that since the funds to be used were originally loaned to Egypt by the United States and since Egypt's obligation to repay the loan was subsequently forgiven, no reimbursement will actually occur within the meaning of CICA and the implementing regulations. Therefore, Optic argues, the sole-source restriction lacks a legal basis. The protester also alleges that there are no valid technical reasons for the restriction and that the sole-source procurement will result in prices higher than those which can be obtained competitively.

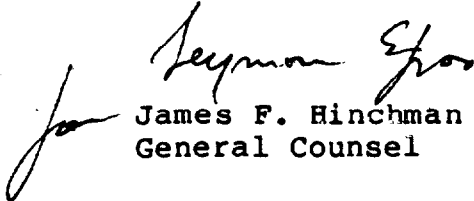
The Army acknowledges that the funds involved in this procurement were loaned to Egypt and that Congress has subsequently discharged that government from its obligation to repay the loan. Continuing Appropriations Act 1988, Pub. L. No. 101-202, § 101(e), 101 Stat. 1329, 1329-148 (1987). However, the agency points out that the funds have been placed in Egypt's FMS trust fund account, to be used at its discretion subject only to the provisions of the Arms Export Control Act; when a purchase is made, the Army notes that the account will be reduced accordingly.

Generally, the Department of Defense acts as an agent for a foreign government when it conducts procurements under the authority of the Arms Export Control Act, using the foreign government's funds that have been deposited in the FMS Trust Fund Account in the Treasury. Whether or not the funds were originally subject to repayment, once they are deposited in a foreign country's account to be used to meet the obligations of the FMS customer, FMS rules and procedures apply, including the authority of a foreign customer to designate a sole-source supplier as permitted by FAR § 6.302-4; International Logistics Group, Ltd., B-214676, Sept. 18, 1984, 84-2 CPD ¶ 314.

Regarding Optic's contentions as to the technical necessity and economic propriety of the procurement, it is evident that the Egyptian Government has made a determination of its military needs and that this procurement merely implements

that determination. Our legal review in such cases extends to determining whether the applicable procurement regulations have been followed; since we find that the sole-source restriction was legally proper, Optic's other allegations provide us with no basis to interfere in the procurement. See International Logistics Group, Ltd., B-214676, supra.

The protest is denied.

James F. Hinchman
General Counsel